Office-Supreme Court, U.S.
FILED
AUG 17 1968
JOHN F. DAVIS, CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1968

No. 417

ATLANTIC OCEAN PRODUCTS, INC., a Massachusetts corporation, TUPMAN THURLOW, INC., a New York corporation, and ARCTIC FISHERY PRODUCTS, LTD., BONAVISTA COLD STORAGE CO., LTD., EARLE BROTHERS FISHERIES, LTD., FISHERY PRODUCTS, LTD., JOB BROS. AND CO., LTD., H. B. CLYDE LAKE, LTD., NORTH EASTERN FISH INDUSTRIES, LTD., NEWFOUNDLAND QUICK FREEZE, LTD., P. JANES AND SONS, LTD., Canadian corporations,

Appellants,

v.

WALTER D. LETH, Director, Department of Agriculture, State of Oregon, and ROBERT Y. THORNTON, Attorney General, State of Oregon,

Appellees.

On Appeal from the United States District Court for the District of Oregon

JURISDICTIONAL STATEMENT

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On Appeal from the United States District Court for the District of Oregon

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Oregon, dismissing appellants' action to enjoin the enforce-

ment of a state statute as unconstitutional. Appellants also appeal from the order of the same court denying appellants' motion to amend the opinion and findings of that court, which were the basis for such judgment. As authorized by Rule 15(3) of this Court, a single jurisdictional statement is submitted.

OPINION BELOW

The opinion below is as yet unreported. A copy of the opinion, and of the judgment and order appealed from, are appended as Appendix A, B and C.

JURISDICTION

This action was brought in the United States District Court for the District of Oregon under 28 U.S.C. § 1331 and § 2201 to enjoin the enforcement of a statute of the State of Oregon, ORS 616.217 and to declare that statute to be unconstitutional. A three judge court was applied for and convened under 28 U.S.C. § 2281 and § 2284. On April 1, 1968, an opinion and judgment were entered by that court, dated March 27, 1968, holding the statute to be constitutional and dismissing appellants' complaint. On May 23, 1968, a notice of appeal from that judgment was filed in that court.

On April 5, 1968, appellants filed a motion to amend the opinion and findings on which the judgment was based. That motion was denied by the same court by order dated and entered on June 26, 1968.

A supplemental notice of appeal from that order was filed in that court on July 22, 1968.

The jurisdiction of the court to review the decision of the District Court by direct appeal is conferred by 28 U.S.C. § 1253 and sustained by the following cases: *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 and *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511.

STATUTE INVOLVED

The Oregon statute, the validity of which is involved, is ORS 616.217, which reads as follows:

> "616.217. RESTRICTION ON LABELING OR SELLING FOOD FISH PRODUCT AS HALIBUT. No person shall label or offer for sale any food fish product designated as halibut, with or without additional descriptive words, unless such food fish product is Hippoglossus hippoglossus or Hippoglossus stenolepis (1967 c. 413, § 2)."

QUESTIONS PRESENTED

A. The principal questions presented for decision are:

1. Is a state statute which denies to importers and dealers in "Greenland halibut" the right to label and sell such fish by its common name ("Greenland halibut") and which grants the exclusive use of the name "halibut" to dealers in "Pacific halibut," an arbitrary discrimination between persons or groups of persons, so as to constitute a denial of Equal Protec-

tion of the Law, in violation of the Fourteenth Amendment?

2. Is a state statute which prohibits the labeling and sale of "Greenland halibut" by its common name ("Greenland halibut"), despite previously existing federal statutes which require food products to be labeled by their common name (and under which "Greenland halibut" has been recognized as the common name for this species), invalid under the Supremacy Clause, Article VI?

3. Does a state statute, enacted at the request of Pacific Northwest fishermen, under which the importation and sale in Oregon of "Greenland halibut" has been virtually eliminated, unreasonably burden or discriminate against the interstate marketing of "Greenland halibut," in violation of the Commerce Clause, Article I, Section 8?

B. Additional questions presented for decision are:

1. Was there substantial or any evidence to support the following statements in the opinion of the District Court (adopted by it as its findings):

(a) That the name "Greenland halibut" is not the "commonly understood name" for such fish;

(b) That sale of "Greenland halibut" by that name is "deceptive";

2. Did the District Court err:

(a) In admitting Exhibit 34, an unpublished report by one of Appellees' witnesses, and

(b) In admitting Exhibit 41, a so-called "consumer poll," without proper identification and foundation?

STATEMENT OF THE CASE

1. Scientific classification of Greenland, Pacific and Atlantic halibut in same "family" and "tribe."

It is conceded that "Greenland halibut," as a "righteye flounder," belongs to the same "classification" or "family" as both "Atlantic halibut" and "Pacific halibut."[1] More specifically, "Greenland halibut," "Pacific halibut," "Atlantic halibut" and the so-called "Arrowtooth" together constitute a "tribe" within that "classification" or "family" and are "tied together" by a series of common characteristics (Ptf. Ex. 10, pp. 23, 7-8).

While "Atlantic halibut" is found in the Atlantic Ocean and "Pacific halibut" in the Pacific Ocean, "Greenland halibut" is found in both the North Atlantic and North Pacific Ocean and also in the Bering Sea (Ptf. Ex. 10, p. 8; Dft. Ex. 31, p. 16; Dft. Ex. 34, p. 3). The "Greenland halibut" is smaller and more bony than "Atlantic" and "Pacific halibut" and has a darker skin (Ptf. Ex. 10, p. 8).

Because of these characteristics, "Greenland hal-

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[1] The "righteye flounders" include, among several other species:
Greenland halibut, or Reindardtius hippoglossoides;
Atlantic halibut, or Hippoglossus hippoglossus, and
Pacific halibut, or Hippoglossus stenolepis.
See Ptf. Ex. 4, p. 47. See also Dft. Ex. 31, pp. 21-2.

ibut" is sold as boneless and skinless fillets, and at a substantially lower price (Ptf. Ex. 12, pp. 11, 21), while "Atlantic" and "Pacific halibut" is sold primarily as sliced steaks or chunks (with skin and bones) and at a higher price (Ptf. Ex. 12, p. 12).

It is conceded that "Greenland halibut" has been accepted as a food fish in the United States, and is generally wholesome and edible (PTO p. 4) and that "there are no health hazards involved, it being only a matter of product identity and not of quality per se." (Dft. Ex. 34, App. p. 7).

2. Established "common name" of "Greenland halibut."

In 1933, a permanent committee of the American Fisheries Society was formed to prepare a list of common names of fishes corresponding to the accepted scientific names (Dft. Ex. 34, p. 5). The stated aim of the committee was "the development of a body of common names that reflect broad current usage" so as to "add to stability and the universality of names applied to American fishes" (Ptf. Ex. 4, p. 1). As a result of the study by that committee, the American Fisheries Society published in 1948, and re-published in 1960, "A List of Common & Scientific Names of Fishes from the United States & Canada" (Ptf. Ex. 4). That list included, among the common names for various species of righteye flounders, "Greenland halibut," "Atlantic halibut" and "Pacific halibut." Ptf. Ex. 4, p. 47).

Much of defendants' testimony in this case was

directed to an attack on the finding by the Society that "Greenland halibut" is the proper and accepted common name for this species (See Dft. Ex. 31 and 34).

It was conceded by defendants' witness, however, that:

> "The American Fisheries Society has probably contributed more during the past 35 years to the painstaking and scholarly resolution of the question of common names of fishes, at least with respect to North American species, than all other public or private agencies in the world combined." (Dft. Ex. 34, p. 5).

It also appears that the name "Greenland halibut" has not only been recognized as the common name for this species by that Society, but also was recognized as the common name for this species as early as 1904 by the International Council for the Exploration of the Sea (Ptf. Ex. 10, pp. 9-10), by 1912, 1934, 1956 and 1966 editions of Webster's dictionary (See opinion, App. A, p. 32), and also, more recently, by the list of "Common and Scientific Names of Species" by the Fisheries Research Board of Canada in 1966, in its publication "Marine Resources of Newfoundland" (Dft. Ex. 33, p. 168). Indeed, the Canadian government recognized "Greenland halibut" as the proper common name for this species, despite the fact that this same publication was the source of testimony by defendants' witness that this species is known as "turbot" in Newfoundland (Dft. Ex. 33, p. 89; Dft. Ex. 31, p. 18, 27). Great Britain also

recognizes "Greenland halibut" as the proper name for this species (Stat. Inst. 1967, No. 1864, Reg. 3(5), Sched. 1, p. 21. See also App. D).

Other "lay sources" admitted by defendant to recognize the name "Greenland halibut" include the Food and Agriculture Organization (FAO) in 1955, and the recently established International Commission for the Northwest Atlantic Fisheries (ICNAF). (Dft. Ex. 34, pp. 21-22).

3. Recognition of "Greenland halibut" as Common Name by Federal Pure Food & Drug Administration.

The federal Food, Drug and Cosmetic Act of 1938 provides that a food shall be deemed to be "misbranded," even if no "standard of identity" has been prescribed, unless its label bears "the common or usual name of the food." (21 U.S.C. § 343(i)). The "Fair Packaging and Labeling Act" of 1966 also provides that regulations to be issued under that Act shall require the labels on packages for all consumer commodities, other than foods (subject to Title 21), shall bear "the common or usual name of such consumer commodity." (15 U.S.C. § 1454(c)(3)). The regulations proposed under that Act include a similar requirement relating to the use of the common or usual names for commodities (Ptf. Ex. 16, § 500.4(d)(2); 32 Fed. Reg. 9109, 9571).

Under the Pure Food, Drug and Cosmetic Act (21 U.S.C. § 321) an Advisory Opinion was issued on August 26, 1964, by the Advisory Opinions Branch

of the Food and Drug Administration to the effect that after consultations with the Bureau of Commercial Fisheries, the Canadian Department of Fisheries and the ichthyologists of the Museum of Natural History, and after consulting the book, "A list of Common and Scientific Names of Fish in the United States and Canada" (published by the American Fisheries Society), "we can only conclude" that this species "should not be labeled as 'flounder' but more appropriately should be labeled as 'Greenland halibut'." (Ptf. Ex. 5(a) and 5(b).

The Pure Food and Drug Administration also delivered a written statement to the Subcommittee on Fisheries and Wildlife Conservation of the Committee on Merchant Marine and Fisheries of the House of Representatives, in response to a request by that subcommittee during hearings on February 6 and 7, 1968, on H.R. 14560, for such a statement for the record. By that public statement, the Pure Food and Drug Administration stated that after considering the American Fisheries Society "List of Common & Scientific Names of Fishes From the United States & Canada" as "the best source for common names for fishes," as well as other sources, and after being requested by the Canadian Embassy for an opportunity to be heard before any change of name, had concluded that "we have been unable to find a justification for the use of any other designation than 'Greenland halibut' . . ." for these species. (For text of statement see App. D, p. 36).

4. Recent campaign by dealers in "Pacific halibut"—adoption of statutes in Oregon, Washington and Massachusetts.

The Halibut Association of North America is an organization comprised of 85 per cent of the dealers buying "Pacific halibut" from fishing vessels in Oregon, Washington, British Columbia and Alaska (Dft. Ex. 32, p. 4). It was organized in 1961 or 1962 for the purpose of promoting the sale of "Pacific halibut" (Id. pp. 5, 18). The president of the Association, Mr. Gilbert, conceded that he was "aware" that although the Department of Health, Education and Welfare (Pure Food and Drug Administration) "has not established standards of identity, (it) has indicated its approval of the words 'Greenland halibut' when used together," i.e., the Advisory Opinion of 8/26/64 (Dft. Ex. 32, p. 15).

Despite the continued recognition of "Greenland halibut" as the established common name for this species (as already noted) and despite knowledge of the approval of the use of the name "Greenland halibut" in labeling such fish for sale to the consumer, the "Pacific halibut" industry nevertheless embarked upon what a defense witness characterized as "an intensive industry-financed campaign" to advertise and "further consumer interest" in "halibut" (without reference to species, i.e., "Pacific halibut" or "Greenland halibut"), resulting in increased demand and higher prices for "Pacific halibut" (Dft. Ex. 34, App. p. 1).

During this same period and following what defendants' witness describes as the "federally sanctioned use of the name 'Greenland halibut' in 1964," Canadian producers of "Greenland halibut" developed a substantial trade with importers of fish in the United States (Dft. Ex. 34, App. p. 1). This "Greenland halibut" was packed after inspection under Canadian regulations (See Fish Inspection Act of Canada, Ptf. Ex. 2) and was then shipped to Gloucester, Mass., where it was subject to import inspection (Ptf. Ex. 11, pp. 6, 29). It was then shipped by refrigerator trucks to wholesalers and large chain stores located in both the eastern and western United States, including Oregon (Id., p. 4-7; Ptf. 12, pp. 5-7). Shipments were made in cartons with the marking "Greenland halibut" on both outside and inside cartons, as required by the Food and Drug Administration (Ptf. Ex. 11, pp. 25-8; Ptf. Ex. 6, 7a, 7b).

In early 1967 the dealers in "Pacific halibut," through their trade association, lobbied in the legislatures of both Oregon and Washington for the adoption of statutes to bar the sale of "Greenland halibut," not only as "halibut," without qualification, but even if plainly labeled and sold by its established common name of "Greenland halibut" (Dft. Ex. 32, pp. 13-16). As a result, statutes to that effect were adopted both in Oregon and also in Washington, as quoted above (Dft. Ex. 34, App. p. 6). More recently, following the decision by the District Court, a similar statute has been adopted in Massachusetts, apparently on behalf of dealers in "Atlantic halibut" (Mass. Stat. 1968, Ch. 525).

5. Effect of Oregon Statute upon Interstate shipments and sales of Greenland halibut in Oregon.

Plaintiffs offered uncontested evidence to establish that, despite *nationwide* increases in sales of Greenland halibut in 1967 over 1966, plaintiffs' sales of Greenland halibut *in Oregon* since the effective date of the Oregon statute on June 12, 1967, had dwindled from 190,060 pounds during the period July to December, 1966, to 19,518 pounds for the same period in 1967. (See testimony of Melvin Reitman, Ptf. Ex. 11, pp. 7-8, and stipulated testimony of Carl Moores, Appendix B, Tr. 3, 24).

The sole reason for this sharp decline, as testified by plaintiffs' witnesses, was that the purchasers, particularly chain stores, stopped buying because they were confused as to how and by what name to advertise the fish for sale (Ptf. Ex. 12, pp. 11, 16).

Indeed, one of the largest chain buyers, Safeway Stores, advised that it would not purchase any more of the Greenland halibut for Oregon while this statute was in effect (Tr. 3, 24. See also Ptf. Ex. 11, p. 10).

6. Analysis of decision by District Court.

An examination of the opinion by Judge Solomon (adopted as the findings of fact and conclusions of law of the District Court) will quickly reveal that it is based upon the following "findings" which, it is submitted, are directly contrary to the evidence, as summarized above:

(a) The "finding" that the name "Greenland halibut" is "not a commonly understood name among the general public," but has been "used in the United States only since 1963 and in Oregon for a shorter time." (See App. A, p. 32)

(b) The "finding" that the consumer is "not aware" of the "differences between 'halibut' and 'Greenland halibut'"; that sale of "Greenland halibut" by that name is "deceptive," and that "this was demonstrated by the sharp drop in sales of the fish after plaintiffs could no longer sell it as 'Greenland halibut'." (See App. A, p. 33).

The *first* of the foregoing "findings" is a finding, in effect, that "Greenland halibut" cannot properly be considered to be the "common name" for this species. Such a finding is clearly contrary to the evidence, because the name "Greenland halibut" has been recognized by the American Fisheries Society as the common name for this species, in the sense that it "reflects broad current usage" (Ptf. Ex. 4, p. 1), as well as by two statements issued by the Pure Food and Drug Administration (see pp. 8-9, above). It also follows from the very fact of the conceded use of that name in the 1912, 1934, 1956 and 1966 editions of Websters dictionary (as recognized by the opinion, App. A, p. 32), that the "finding" of the court that "the term 'Greenland halibut' has been used in the United States only since 1963 and in Oregon for a shorter time" is also contrary to the admitted facts. Moreover, the court does not undertake to find a different "common name" for this spe-

cies, despite its "finding" that the species is known in Newfoundland as "turbot." As already noted, even the Fisheries Research Board of Canada, despite recognition of that fact, found that "Greenland halibut" is the common name for this species (Dft. Ex. 33, pp. 89, 168).

The *second* "finding"—that the consumer is "not aware" of the "differences between 'halibut' and 'Greenland halibut' " and is thus "deceived" by use of the name "Greenland halibut"—is also contrary to the evidence for three reasons:

(a) Such a finding pre-supposes that "Greenland halibut" is not the "common name" for this species, and one that reflects "broad current usage," contrary to all of the foregoing facts;

(b) The alleged "finding" that retail consumers were "deceived" is based solely upon the deduction that "this was demonstrated by the sharp drop in sales of the fish after plaintiffs could no longer sell it as 'Greenland halibut'." (See App. A, p. 33). On the contrary, the only evidence in the record is that the sole and only reason for the "sharp drop in sales of the fish" in Oregon was that Safeway Stores and other wholesale buyers refused to purchase it because of the adoption of the Oregon statute. (See p. 12, above).

(c) The finding is based upon alleged confusion by customers as to the "differences between 'halibut' and 'Greenland halibut'." The only evi-

dence of any such possible confusion was a so-called "consumer poll" (Ptf. Ex. 41, received over objection and without proper identification), purporting to show that 41.3% of 2751 persons polled did not know the difference between "Greenland halibut" and "*halibut*" and that 20.9% thought there was no difference. Since, however, "Greenland halibut" is one of three species of "halibut," (rather than a species distinct from "halibut") the question asked as the basis for the poll was itself confusing, if not completely improper, and thus provides no valid basis for a finding of consumer "deception."

THE QUESTIONS ARE SUBSTANTIAL

1. A state statute granting to local dealers the exclusive use of a common generic name and denying its use to importers of products bearing that name is contrary to the interest of the public in preserving the right of all persons to describe goods for sale by the common names of such goods and to resist attempts to monopolize the exclusive use of such names and raises a substantial question whether "equal protection of the law" has been denied.

The Oregon statute would grant to local dealers in "Pacific halibut" the exclusive use of the name "halibut" and would prohibit the use of that name by importers of and dealers in "Greenland halibut," despite the fact that such is the recognized common and generic name for this species of fish.

It has long been the established law in the United

States, both at common law and under federal trademark statutes, that everyone has the right to describe the goods which he sells by the common or generic name of such goods and that no one can appropriate, monopolize or claim the exclusive use of such a common or generic name to the exclusion of others who wish to use the same descriptive words. *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U.S. 537, 546-7; *Estate of P.D. Beckwith* v. *Commissioner*, 252 U.S. 538, 543; *Fawcett Publications, Inc.* v. *Popular Mechanics Co.*, 80 F.2d 194, 198; *W. G. Reardon Laboratories, Inc.* v. *B. & B Exterminators*, 71 F.2d 515, 517. The reason for this rule, as stated by this court in *Lawrence*, supra at p. 547, is that otherwise "the public would be injured rather than protected, for competition would be destroyed."

This rule is related to the equally well-established rule that everyone has the right to copy unpatented and uncopyrighted articles and that the free exercise of this right is one in which the consuming public is "deeply interested." *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, at 231, quoting from *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 122. In such cases, as held by this court in *Sears, Roebuck*, supra, at 231-2, a state cannot by statute prohibit the copying of such an article, since otherwise the state would be permitted to "block off from public use something which federal law has said belongs to the public."

In a case involving facts somewhat similar to those of this case, it was held by the Court of Ap-

peals for the Ninth Circuit, in *Willapoint Oysters* v. *Ewing*, 174 F.2d 676 at 697, that a "standard of identity" issued by the Food and Drug Administration which required packers of Pacific oysters to label their product as "Pacific oysters," while permitting packers of Eastern and Southern oysters to label their product as "oysters," was arbitrary and invalid as permitting packers of Eastern and Southern oysters to enjoy the "exclusive use of a term naturally associated with and normally applied to an article of food in common use under a common name without the most cogent reasons directly pertinent to the protection of the consuming public. . . ." That decision was reached despite the fact that "Pacific oysters" are of a different size and have different characteristics than "Eastern oysters" and "Southern oysters." This Court denied certiorari in that case in 338 U.S. 860 and denied a petition for rehearing in 339 U.S. 945.

In this case, of course, the Oregon statute goes even further and prohibits dealers in "Greenland halibut" from labeling and selling their product even by that name, while permitting dealers in "Pacific halibut" to sell their product as "halibut." Also, while "Greenland halibut" may be somewhat smaller than "Pacific halibut" and have some different characteristics, (as in the case of "Pacific oysters"), it is conceded that "Greenland halibut" has been accepted as a human food fish and is generally wholesome and edible. Thus, even less "cogent reasons" exist for discrimination in this case than in Willapoint. As held

by this Court in *J. Burns Baking Co.* v. *Bryan*, 264 U.S. 504, at 513:

> ". . . a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

It also follows, for the same reasons, that the Oregon statute bears no "rational relationship to a legitimate regulatory interest." (See *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 152).

It is thus submitted that the Oregon statute discriminates arbitrarily in favor of local dealers in "Pacific halibut" and against importers of and dealers in "Greenland halibut" and that this results in a denial to them of their constitutional right to equal protection of the laws.

As yet, this Court has not passed directly upon this question. Because, however, the Oregon statute is thus so clearly unconstitutional as a denial of equal protection of the law and because of the danger that the precedent of a decision by the three-judge court in this case may encourage other states to adopt similar legislation (Washington and Massachusetts have already done so), it is submitted that this is a most substantial question and one which should be decided by this court, just as this court accepted jurisdiction and decided in *Sears, Roebuck*, supra, that a state may not prohibit the right of the public to copy unpatentable articles.

Just as the public, in the interest of preserving free competition, has an interest in preserving the right to copy unpatentable articles, so also the public, for the same reason, has an interest in preserving the right of everyone to fairly describe the goods which he makes or sells by their common or generic names and in resisting attempts to monopolize the exclusive use of such names, whether or not under the guise of state legislation.

2. A state statute prohibiting the labeling of food products by their common name, contrary to federal legislation which requires that such food products be labeled by their common name, also raises a substantial question whether the "Supremacy" Clause of the Constitution has been violated.

The Oregon statute prohibits the labeling of "Greenland halibut" by its recognized common name —"Greenland halibut." Federal statutes, on the contrary, require the labeling of all food products by their common name and federal authorities have recognized "Greenland halibut" as a proper name for the labeling of such fish.

The entire field of the labeling of the food products has long been the subject of federal legislation. Thus, the Lanham Act prohibits any "false description" of foods imported into the United States or shipped in interstate commerce (15 U.S.C. § 1125). Similarly, the Food, Drug and Cosmetics Act specifically provides that food shall be deemed to be "misbranded," even if no "standard of identity" has been adopted, unless its label bears "the common or usual

name of such food." (21 U.S.C. § 343(i)). More recently, the Fair Packaging and Labeling Act of 1966 provides that the Secretary of Health, Education and Welfare shall have authority to issue regulations to require, among other things, that the "label on each package of a consumer commodity (other than one which is a food within the meaning of section 321(f) of Title 21) bear (A) the common or usual name of such consumer commodity, if any." (15 U.S.C. § 1454(c)(3)).

On August 26, 1964, the Advisory Opinion Branch of the Food and Drug Administration issued an opinion stating that "Greenland halibut" should not be labeled as "flounder," but more appropriately should be labeled as "Greenland halibut" (Ptf. Ex. 5 a). More recently, in response to a question during hearings on February 6 and 7, 1968, on H.R. 14560 by the Subcommittee on Fisheries and Wildlife Conservation of the Committee on Merchant Marine and Fisheries, House of Representatives, the Food and Drug Administration issued a public statement which, in effect, reaffirmed its previous position in stating that:

> ". . . we have been unable to find any justification for use of any other designation than 'Greenland halibut' . . ." (See Appendix D).

Various tests have been stated by this Court for determining whether a state statute violates the Supremacy Clause of the federal Constitution. In *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, at 236, this court stated that:

> "The test, therefore, is whether the matter on which the state asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails, though it is a more modest, less pervasive regulatory plan than that of the state."

On the other extreme, this Court in *Florida Lime and Avocado Growers, Inc.* v. *Paul*, supra, at 142, stated that:

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

More recently, this court, in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, quoted with approval (at p. 240) its previous decision in *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, in which this court declared that a state law cannot stand that:

> ". . . either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the federal government to discharge the duties for the performance of which they were created."

To the same effect, see: *Farmers Educational and Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 at 535; ("an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 at 766 (infringement of "policy" of act of Congress);

Cloverleaf Butter Co. v. *Patterson*, 315 U.S. 148, 153 effect on "national regulatory policy").

In this case, it is submitted that the state statute is invalid under any of the foregoing "tests." Thus, not only is the subject of regulation over the labeling of food products a "matter" which is "in any way regulated" by federal statute (within the rule of *Rice*), but it is obvious that both regulations cannot be enforced "without impairing the federal superintendence of the field" (within the rule of *Florida Lime*). At the least, it is clear that enforcement of the state law would "frustrate the purpose" of the federal legislation and also "impair the efficiency" of the Food and Drug Administration in its "superintendence" over the field of the labeling of food products (within the rule of *Nash*).

Indeed, such conclusions are inescapable from the fact that the state's statute prohibits the labeling of "Greenland halibut" by that name, which is the common name for such fish and thus a name by which it must be labeled in order to comply with the federal statutes.

In *McDermott* v. *Wisconsin*, 228 U.S. 115, this Court held invalid a state statute requiring labeling contrary to provisions of the Federal legislation in effect at that time, holding at page 134, that:

> "The Wisconsin Act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain exclusive labels required by the statute is in excess of its legitimate power."

In reaching that conclusion, this court held at pp. 132-3 that:

> "The label of the unsold article is, in the one case, the evidence of the shipper that he has complied with the Act of Congress, while in the other, by its misleading and false character, it furnishes proof upon which the Federal authorities depend to reach and punish the shipper and to condemn the goods. . . . In other words, the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress."

Likewise, in this case, the label affixed to "Greenland halibut" imported and sold in Oregon will determine compliance with both federal legislation and also with the state statute in question—this for the reason that if such fish is labeled "Greenland halibut" such a label, while providing evidence of compliance with federal legislation, provides, at the same time, proof of violation of the state statute, while the labeling of such fish by any other name, while perhaps furnishing proof of compliance with the state statute, would furnish proof of violation of the federal statutes under which such fish must be labeled by its common name of "Greenland halibut."

In *Cloverleaf Butter Co.* v. *Patterson*, supra, one of the facts which was apparently considered by this court in accepting jurisdiction over that case was its recognition at page 167, that:

> "The manufacture and distribution in interstate and foreign commerce of process and reno-

vated butter is a substantial industry which, because of its multi-state activity, cannot be effectively regulated by isolated competing states."

Similarly, in this case, since the importation and distribution of food products, including "Greenland halibut," is a most substantial industry which, because of its multi-state activity, cannot be effectively regulated by competing states, it is submitted that this case also presents a most substantial question under the "supremacy" clause of the Federal Constitution and one over which this court should accept jurisdiction. Indeed, the statutes adopted in Oregon and Washington, followed by the adoption of a similar statute in Massachusetts after the decision by the District Court in this case (Mass. Stat. 1968, ch. 525), shows the emergence of a pattern which could largely frustrate the entire scheme of federal regulation under which food products must be labeled by their common names.

3. A state statute, enacted to protect local industry, which goes beyond the limits necessary to protect the health, life and safety of its citizens, frustrates federal legislation on the subject and is part of a developing pattern of similar legislation in other states, imposes an unreasonable burden on commerce and presents a substantial question for decision.

As previously stated (p. 12, supra) the uncontested evidence was that despite nationwide increases in the sale of "Greenland halibut" in 1967, over 1966, plaintiff's sales of "Greenland halibut" in Oregon since the effective date of the Oregon statute had

been reduced by approximately 90 per cent and that the reason for this sharp decline was that chain stores stopped buying because they were confused as to how and by what name to advertise the fish for sale. As one witness testified:

> ". . . The law said, 'you can't call it this' but Uncle Sam says, 'you're supposed to call it that' and the state wouldn't tell you what to call it and it was just a mass of confusion." (Ptf. Ex. 12, p. 16).

Thus, it is clear that the effect of the statute has been to substantially curtail the importation and shipment of interstate commerce of "Greenland halibut" into the State of Oregon and that the sole remaining question is whether the resulting "burden" imposed by the statute is a "reasonable burden on interstate commerce."

It is true, as held by this court in *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, at page 443, that the "commerce clause" of the Federal Constitution was not intended "to cut the state off from legislating on all subjects relating to health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country." On the other hand, however, the exercise of that authority must be a bona fide one in the sense that it is reasonably intended to avert a "real and substantial threat to the health and safety of its citizens." *Tupman Thurlow Co.* v. *Todd* (D.C. Ala.) 230 F. Supp. 230, at 234. See also *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354-6.

In this case, since it has been stipulated that "Greenland halibut" is accepted as a human fish food and is generally wholesome and edible, (PTO p. 4) and since it has been admitted that "there are no health hazards involved, it being only a matter of product identity and not of quality per se" (Dft. Ex. 34, App. p. 7), there can be no contention that the Oregon statute was necessary to protect the public health. As for the contention that the statute was necessary to protect the public from "deception" the answer is that:

(a) There was no evidence of consumer "deception" in this case, for reasons already stated (see pp. 14-15, supra);

(b) Protection of the public from "deception" cannot justify a grant of the exclusive use of a common name to local dealers, to the exclusion of others, any more than protection of the public from deception could justify a state statute which prohibited the copying of an unpatentable article and which was held to be invalid, despite such a contention, in *Sears, Roebuck Co.* v. *Stiffel Co.*, supra, at 232.

(c) In any event, state legislation adopted for such a purpose must not "exceed the limits necessary to vindicate that interest." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, supra at 154, citing *Dean Milk Co.* v. *Madison*, supra.

(d) A statute which prohibits the labeling of a product for sale by its common name and confers upon dealers in similar products the exclu-

sive use of that name not only "exceeds the limits necessary" to prevent deception of the public, but actually results, if anything in more public confusion. Thus, if the Oregon legislature had been interested only in preventing deception to the public, the obvious means of preventing such deception would have been to require the labeling of "Pacific halibut" as "Pacific halibut" and "Greenland halibut" as "Greenland halibut"—thus requiring both species to be labeled by their common names.

It follows that in prohibiting the sale of "Greenland halibut" by that name and in conferring the exclusive use of the word "halibut" upon dealers in "Pacific halibut," the statute not only "exceeded the limits necessary" to prevent deception to the public, but actually contributed to further confusion, particularly since no name other than "Greenland halibut" was specified as a proper name for the sale of such fish and its sale by another name would violate requirements of federal legislation on the subject. (Cf. *Armour & Co.* v. *Freeman*, 304 F.2d 404 at 406, cert. den. 370 U.S. 920, in which the court held that Secretary of Agriculture should have required label of ham to show percentage of moisture content, instead of bearing label "imitation ham").

A further and separate ground on which many state statutes have been held to impose unreasonable burdens on Interstate Commerce is that such statutes have "unreasonably favored local producers at the

expense of competitors from other states." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, supra at 154. See also *Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U.S. 361, at 377; *Ness Produce Co.* v. *Short*, 263 F. Supp. 586, 589, aff'd. 385 U.S. 537.

In this case, it is conceded that the Oregon statute was adopted as a result of lobbying by the association representing dealers in Pacific halibut (Dft. Ex. 32, pp. 13-16; Dft. Ex. 34, App. p. 6). In addition, it is clear that the dealers in "Pacific halibut," by being granted a statutory monopoly for exclusive use of the term "halibut," were "unreasonably favored . . . at the expense of competitors from other states," who are prohibited from using the term "halibut" in the sale of "Greenland halibut."

A further ground upon which state legislation may be held to impose an unreasonable burden on interstate commerce is that such legislation, although adopted under the guise of exercising the police power of the state would, by interfering with or frustrating the operation of federal legislation on the same subject, "discredit and burden legitimate Federal regulations of interstate commerce." *McDermott* v. *Wisconsin*, supra, at 133. This, of course, involves the same question as previously discussed relating to the conflict between the Oregon statute and federal legislation on the subject of the labeling of food products.

This court in *Florida Lime and Avocado Growers, Inc.* v. *Paul*, supra, considered the question of whether a California statute relating to the labeling of avo-

cados imposed an unreasonable burden on interstate commerce to be a substantial question requiring decision by this court. For the same reasons, it is submitted that the question whether the statute adopted by the State of Oregon, (and also now by the States of Washington and Massachusetts) imposes an unreasonable burden upon the importation and sale of "Greenland halibut" in interstate commerce is an equally substantial question requiring decision by this Court.

As held by this Court in *Baldwin* v. *Seelig*, 294 U.S. 511, at 522:

> "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

Similarly, in this case, the effect of the Oregon statute has been not only to protect local dealers in "Pacific halibut" by the exclusion of imported "Greenland halibut," but has also resulted in depriving the public from the benefit of an admittedly wholesome, but substantially less expensive, fish product.

CONCLUSION

For the reasons stated, it is submitted that the questions presented by this appeal are so substantial

as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

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